Supreme Court, U.S.
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No. 04-343

In The

Supreme Court of the United States

ROSELIA RIOS DE AGUAYO,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The overriding issue in this case is whether as applied herein 8 U.S.C. § 1252(a)(2)(B)(i) is unconstitutional to the extent that when coupled with 28 U.S.C. § 2241 "no court" has jurisdiction to review a decision regarding "exceptional and extremely unusual hardship" for relief from removability under 8 U.S.C. § 1229b(b)(1)?

LIST OF PARTIES

The parties to the proceeding are set forth in the case caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING REVIEW	5
I. The federal question of whether there is a constitutional right to judicial review of claims of abuse of discretion regarding the requirement of "exceptional and extremely unusual hardship" for § 1229b(b) (1) relief from removal is a matter of exceptional importance	6
II. The underlying basis of the decision below is grounded on a point left undecided in prior Supreme Court and Ninth Circuit decisions, *to wit*: whether there is a constitutional right to judicial review?	7
III. The decision below disregards well-settled principles of *stare decisis*	7
IV. The use of the doctrine of avoidance in the decision below is doubly problematic	8

TABLE OF CONTENTS – Continued

Page

V. The decision below is incorrect since it is based upon the erroneous legal assumption that there is no constitutional right to judicial review 9

A. Introduction 9

B. The limits of the jurisdictional issue before the Court: Whether Congress has the power to deny judicial review in a case which otherwise falls squarely within the purview of Article III? 11

C. The principles and rules of construction... 12

D. The plain meaning of Article III 13

1. A plain view of the language of Article III as a whole focusing on the power of the judiciary 13

2. A plain view of the language of Article III as a whole focusing on the power of the legislature 17

E. The right to judicial review is in harmony with the totality of the constitution 18

CONCLUSION 20

APPENDIX

	Page
Opinion Of The Court Of Appeals	1a
Opinion Of The Board Of Immigration Appeals	3a
Opinion Of The Immigration Judge	5a
Order Of The Court Of Appeals Denying Rehearing	18a
U.S.Const., art. III	19a
8 U.S.C. § 1252(a)(2)(B)(i)	20a
28 U.S.C. § 2241	22a
8 U.S.C. § 1229b(b)(1)	23a

TABLE OF AUTHORITIES

Page

CASES:

Ardestani v. INS, 112 S.Ct. 515 (1991) 12

Cardoza-Fonseca v. INS, 480 U.S. 421 (1987) 12

Castro-Cortez v. INS, 239 F.3d 1037 (9th Cir. 2001) 1

Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987) 3

Cohen v. Virginia, 19 U.S. 264 (1821) 8

Consumer Product Safety Commission v. GTE, Inc., 447 U.S. 102 (1980) 12

Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) 5, 7

Eisentrager v. Forrestal, 174 F.2d 961 (U.S.App.D.C. 1949) 16

Gutierrez-Chavez v. INS, 298 F.3d 824 (9th Cir. 2002), amended and reh'g denied, 337 F.3d 1023 (9th Cir. 2003) 4, 7, 8

INS v. Chadha, 462 U.S. 919 (1983) 13

INS v. Phinpathya, 464 U.S. 183 (1984) 12

INS v. St. Cyr, 121 S.Ct. 2271 (2001) 7, 8, 9

Matter of Recinas, 23 I. & N.Dec. 467 (BIA 2002) 3

Mejia-Carrillo v. U.S.I.N.S., 656 F.2d 520 (9th Cir. 1981) 3

Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001) 1

Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) 13

Romero-Torres v. Ashcroft, 327 F.3d 887 (9th Cir. 2003) 3, 4, 7, 8

TABLE OF AUTHORITIES – Continued

Page

Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985) 8

United States v. Wilson, 503 U.S. 329 (1992) 12

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S.Const.

art. I 14, 15, 17, 19

art. III ..... *passim*

Fifth Amendment 19

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub.L. 105-208, Div. C, Sept. 30, 1996, 110 Stat. 3009) ("IIRIRA")

§ 240A(b)(1) 2

§ 242(a)(2)(B)(i) 2

Immigration And Nationality Act

§ 101(a)(15)(V) 1

§ 212(c) 3, 4

Legal Immigration Family Equity Act (LIFE Act) (enacted as tit. XI of Act of December 21, 2000, Pub.L.No. 106-553, § 1102, 114 Stat. 2762) 1

United States Code

8 U.S.C. § 1101(a)(15)(V) 1

8 U.S.C. § 1182(c) 3

8 U.S.C. § 1229b(b)(1) 2, 4, 5

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1252 11

8 U.S.C. § 1252(a)(2)(b) 7

8 U.S.C. § 1252(a)(2)(B)(i) 2, 5, 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 ..... 2, 4, 5, 7

MISCELLANEOUS:

Amar, *A Neo-Federalist View Of Article III: Separating The Two Tiers Of Federal Jurisdiction*, 65 B.U.L.Rev. 205 (1985) 14

Berger, *Congress v. The Supreme Court* (Harvard University Press 1969) 6, 10

Chemerinsky, *Federal Jurisdiction* (Little Brown & Co. 1989) 8, 12

Clinton, *A Mandatory View Of Federal Court Jurisdiction A Guided Quest For The Original Understanding Of Article III*, 132 U.Pa.L.Rev. 741, 742 (1984) 12, 14, 16

Deuteronomy 1:9-18 (King James) 6

Engdahl, Intrinsic Limits On Congress' Power Regarding The Judicial Branch, 1999 BYU L. Rev. 75 17

Exodus 18:13-26 (King James) 6

Guttentag, "The 1996 Immigration Act . . . " 74 Int. Rel. 245 (Feb. 10, 1997) 6

Hervey, Federal Textbook On Citizenship (U.S.Dept. of Justice, INS 1973) 19

Isaiah 33:22 (King James) 6

TABLE OF AUTHORITIES – Continued

Page

Note, The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions, 110 Harv.L.Rev. 1850 (1997) 13

115 Harv.L.Rev. 477 (2001) 7, 8, 9

Jaffe, Judicial Control of Administrative Action (Little, Brown & Co. 1965) 19

1 Nat'l Lawyers Guild, *Immigration Law and Defense* 3d (Clark Boardman Callaghan 1997)..... 11, 19

Redish, *Federal Jurisdiction: Tension In The Allocation Of Judicial Power* 2d (Michie Co. 1990) 13

Redish, 15 *Moore's Federal Practice* (Matthew Bender & Co., 1997) 14, 19

Rotunda & Nowak, *Treatise On Constitutional Law: Substance and Procedure* 2d (West Pub. Co. 1992) 12, 13, 16, 17

Tribe, *American Constitutional Law* (The Foundation Press 1988) 8

Wright, et al., *Federal Practice And Practice: Jurisdiction Jurisdiction 2d*, § 3526 (West Pub. Co. 1984) 11, 15

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) and its order denying the petition for rehearing (App. 18a) are unreported. The opinion of the Board of Immigration Appeals ("BIA") (App. 3a-4a) is unreported. The opinion of the Immigration Judge ("IJ") (App. 5a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2003, and its order denying the petition for rehearing was entered on June 7, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

[1] The undersigned counsel is informed and believes and thereon states that on or about Thursday, August 26, 2004, at about 2:10 a.m., agents of the Department of Homeland Security ("DHS"), (formerly the Immigration and Naturalization Service ("INS")) removed the petitioner to Mexico without prior notice to him notwithstanding that she was clearly eligible for a nonimmigrant V visa since she is the spouse of a lawful permanent resident alien with a pending visa petition under the 2A immigrant visa category filed on her behalf on January 14, 1998 which has been pending three years or more, *see* § 101(a)(15)(V), I.&N.Act, as amended, 8 U.S.C. § 1101(a)(15)(V), as added by the Legal Immigration Family Equity Act (LIFE Act) (enacted as tit. XI of Act of December 21, 2000, Pub.L.No. 106-553, § 1102, 114 Stat. 2762) enacted for the purpose of uniting families in light of the lengthy backlog in immigrant visas; however, since judicial review is not foreclosed by deportation, *see, Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) and *Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001), this Court has jurisdiction to hear this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.Const., art. III is set out in the appendix (App. 19a-20a).

2. § 242(a)(2)(B)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub.L. 105-208, Div. C, Sept. 30, 1996, 110 Stat. 3009) ("IIRIRA"), 8 U.S.C. § 1252(a)(2)(B)(i) (hereinafter "§ 1252(a)(2)(B)(i)") is set out in the appendix (App. 20a-22a).

3. 28 U.S.C. § 2241 is set out in the appendix (App. 22a-23a).

4. § 240A(b)(1), I.&N.Act, as amended, 8 U.S.C. § 1229b(b)(1) (hereinafter "§ 1229b(b)(1)") is set out in the appendix (App. 23a-26a).

STATEMENT

Petitioner Roselia Rios De Aguayo ("Ms. Rios De Aguayo"), a hardworking, taxpaying, law-abiding alien with over 21 years of continuous residence in the United States, is statutorily eligible for cancellation of removal under § 1229b(b)(1).[2] The IJ found that there was "nothing in the record which would require him to reject her application" for

[2] Aliens such as Ms. Rios De Aguayo are statutorily eligible for cancellation of removal if they can show (1) at least 10 years continuous physical presence in the United States preceding the date of such application, (2) good moral character during that period, (3) no conviction of an offense under certain enumerated sections of IIRIRA, and (4) exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. *See* § 1229b(b)(1) at App., *infra* 23a-24a.

such relief in the exercise of discretion, *see* App., *infra*, 8a; however, he denied her application on the ground that she had failed to establish her removal from this country would result in "exceptional and extremely unusual hardship" to her spouse, a lawful resident alien,[3] and her two children (now ages 12 and 5), who are United States citizens, *see* App., *infra*, 15a.[4] The BIA affirmed, without opinion, the IJ's decision thereby adopting the IJ's decision as its own. Ms. Rios De Aguayo then petitioned for review before the Ninth Circuit Court of Appeals arguing, *inter alia*, that the BIA had abused its discretion in adopting the IJ's finding that she had not shown the requisite "exceptional and extremely unusual hardship"[5] and that the court had jurisdiction to hear her case pursuant to the plain meaning of Article III of the United States Constitution;[6] however, the court dismissed her petition pursuant to its decision in *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003) on the ground that it lacked jurisdiction to review a discretionary decision regarding exceptional and extremely unusual hardship:

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[3] On February 12, 2001, an IJ granted Ms. Rios De Aguayo's spouse's application for a waiver of removability pursuant to former § 212(c), I.&N.Act, 8 U.S.C. § 1182(c).

[4] In adopting the IJ's conclusion in this regard the BIA departed from well-established precedent in the Ninth Circuit holding that separation from family alone may establish "extreme hardship" under the prior law, *see, e.g., Mejia-Carrillo v. U.S.I.N.S.*, 656 F.2d 520, 522 (9th Cir. 1981) and *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987); moreover, it inexplicably departed from its own recent precedent in *Matter of Recinas*, 23 I.&N.Dec. 467 (BIA 2002), wherein it held that the four American born children and the lawful resident alien parents of a single mother of six (two of which were born abroad) would suffer "exceptional and extremely unusual hardship" if she were deported to Mexico.

[5] Petitioner's [Ninth Circuit] Opening Brief at pp. 24-30.

[6] *Id.*, at pp. 9-24.

> We sua sponte dismiss in part this petition for review because the court lacks jurisdiction to review a discretionary decision regarding exceptional and extremely unusual hardship. **See** 8 U.S.C. § 1252(a)(2)(B)(i); **Romero-Torres v. Ashcroft**, 327 F.3d 887, 892 (9th Cir. 2003) . . .

See App., *infra*, 1a.

Ms. Rios De Aguayo has not filed a petition for writ of habeas corpus in the district court below since it would have been futile to do so in light of the Ninth Circuit's earlier decision in *Gutierrez-Chavez v. INS*, 298 F.3d 824 (9th Cir. 2002), amended and reh'g denied, 337 F.3d 1023 (9th Cir. 2003), wherein the court of appeals held, in connection with an application for a waiver of deportability under former § 212(c), that the terms of 28 U.S.C. § 2241:

> [D]o not allow [the court], in the absence of constitutional or statutory error, to second-guess the manner in which the INS chooses to exercise discretion given it by statute . . .

Gutierrez-Chavez v. INS, supra at 827.

Consequently, the holdings in *Romero-Torres v. Ashcroft, supra*, and *Gutierrez-Chavez v. INS, supra*, taken together, bar Ms. Rios De Aguayo from seeking review in any court in connection with her claim that the BIA abused its discretion in finding that she had not shown the requisite "exceptional and extremely unusual hardship" for § 1229b(b)(1) relief from removal; moreover, such cases, taken together, serve to establish by implication, without the support of any legal authority, the underlying holding

that there is no constitutional right to judicial review in cases involving a claim such as hers.[7]

REASONS FOR GRANTING REVIEW

Ms. Rios De Aguayo seeks review of the Ninth Circuit's decision for the following reasons: (1) it is grounded on the resolution in the negative of an underlying federal question of exceptional importance," *to wit*: whether as applied in this case § 1252(a)(2)(B)(i) is unconstitutional to the extent that when coupled with § 2241 "no court" has jurisdiction to review a decision regarding "exceptional and extremely unusual hardship" for relief from removability under § 1229b(b)(1)?, (2) it is based upon a point left undecided in prior Supreme Court and court of appeals decisions, *to wit*: whether there is a constitutional right to judicial review?, (3) it disregards the well-settled principles of *stare decisis* of this Court and the Ninth Circuit, (4) its use of the doctrine of avoidance is doubly problematic, and (5) it is incorrect since it is based upon the erroneous legal assumption that there is no constitutional right to judicial review.

[7] Note that the Ninth Circuit has never expressly arrived at such conclusion except by way of *dictum* in *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996) wherein it stated that "aliens have no constitutional right to judicial review of deportation orders."

I. The Federal Question Of Whether There Is A Constitutional Right To Judicial Review Of Claims Of Abuse Of Discretion Regarding The Requirement Of "Exceptional And Extremely Unusual Hardship" For § 1229b(b)(1) Relief From Removal Is A Matter Of Exceptional Importance.

"The right to judicial review of Executive Branch action is a cornerstone of our democracy," Guttentag, "The 1996 Immigration Act. . . " 74 Int. Rel. 245 (Feb. 10, 1997).[8] This is so since the purpose of the judiciary is to protect the rights of individuals by providing security therefor and guarding against the federal abuse of power thereto, *see* Raoul Berger, *Congress v. The Supreme Court* at 16-22 (Harvard University Press 1969) (hereinafter Berger):

> For an unenforceable 'right' is an empty shell; from Roman times onward a 'right' has been deemed inseparable from a remedy.

Id. at 298. "Nothing can be more material to the obligation than the means of enforcement." *Id.* at 299 n.8.

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[8] Indeed, the concept for such right predates the Constitution, *see*, e.g., Exodus 18:13-26 (King James) (the origin of the Old Testament appellate court system), Deuteronomy 1:9-18 (King James) (the implementation of such system which included causes involving "the stranger," *at* v. 16), and Isaiah 33:22 (King James) (the role of such system within the Old Testament model of a government characterized in relevant part by diversity (three different but equal parts) and unity (functioning as one).

II. The Underlying Basis Of The Decision Below Is Grounded On A Point Left Undecided In Prior Supreme Court And Ninth Circuit Decisions, *To Wit*: Whether There Is A Constitutional Right To Judicial Review?

The Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 221, 150 L.Ed.2d 347 (2001), left undecided the question of whether there is a constitutional right to judicial review. *See* 115 Harv.L.Rev. 477 (2001) (*review of INS v. St. Cyr, supra*). Also, the Ninth Circuit has expressly left undecided such question. *See*, for example, *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996), stating that the availability and scope of collateral habeas review where the Constitution may require judicial intervention was not an issue before the court. Therefore, there is no legal support for the assumption underlying the decision below to the extent that, coupled with *Gutierrez-Chavez v. INS*, *supra*, "no court" has jurisdiction to hear Ms. Rios DeAguayo's claim.

III. The Decision Below Disregards Well-Settled Principles Of *Stare Decisis*.

The decision below disregards well-settled principles of *stare decisis* to the extent that *Romero-Torres v. Ashcroft, supra* (holding that pursuant to the terms of 8 U.S.C. § 1252(a)(2)(b) jurisdiction does not exist *via* petition for review to review a subjective, discretionary judgment, *to wit*, the denial of cancellation based on a rejected claim of "exceptional and extremely unusual hardship"), and *Gutierrez-Chavez v. INS, supra* (holding that the terms of 28 U.S.C. § 2241 do "not allow [the Court], in the absence of constitutional or statutory error, to second-guess the manner in which the INS chooses to

exercise discretion given it by statute" such as whether it "improperly balanced the equities"), taken together, establish by implication that there is no constitutional right to judicial review in cases involving a claim such as Ms. Rios De Aguayo's. First, such issue does not appear to have been raised by the parties or addressed by the Court in *Romero-Torres v. Ashcroft, supra,* or in *Gutierrez-Chavez v. INS, supra*; moreover, it has apparently never been resolved by any Court.[9] Accordingly, neither *Romero-Torres v. Ashcroft* nor *Gutierrez-Chavez v. INS*, can serve, individually or collectively, as binding precedents in the case herein on the issue of the constitutional right to judicial review. *See Cohen v. Virginia*, 19 U.S. 264, 399-400 (1821); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1287-1288 (9th Cir. 1985) ("prior decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court in that case").

IV. The Use Of The Doctrine Of Avoidance In The Decision Below Is Doubly Problematic.

Ms. Rios De Aguayo raised the argument below that she has a constitutional right to judicial review pursuant to the plain meaning of Article III of the United States Constitution; however, the Ninth Circuit, apparently implicitly relying on the constitutional avoidance doctrine, did not

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[9] *See* Tribe, *American Constitutional Law*, § 3.5 "Judicial Review In an Institutional Setting" The Pardox of Congressional Control of Federal Court Jurisdiction" at 43 (The Foundation Press, Inc., 2 ed. 1988), Chemerinsky, *Federal Jurisdiction*, § 3.3 "Congressional Restriction Of Lower Federal Court Jurisdiction" at 177 (Little, Brown & Co. 1989), and 115 Harv.L.Rev. 477 (2001) (*review of INS v. St. Cyr*, 121 S.Ct. 2271 (2001).

account for the constitutionality of § 1252(a)(2)(B)(i). The use of the doctrine in such manner, however, is very problematic:

> The canon is doubly problematic. First 'the idea that the court is avoiding a constitutional decision is illusory . . . [and] there is only negligible difference between the effect of the tentative decision in [a constitutional avoidance] case and the effect of a final decision in a case that actually decides the constitutional question.' Schauer, *supra*, at 89. Moreover, and more importantly, 'all of this takes place without the necessity of the full statement of reasons supporting the constitutional decision.' *id.*

See 115 Harv.L.Rev. 477, 486-487 n.66 (2001), *review of INS v. St. Cyr, supra*.

V. The Decision Below Is Incorrect Since It Is Based Upon The Erroneous Legal Assumption That There Is No Constitutional Right To Judicial Review.

The decision below is based upon the erroneous legal assumption that there is no constitutional right to judicial review; however, such assumption is legally erroneous since, as is shown herein-below, such right does exist.

A. Introduction.

Using traditional tools of construction, it is clear that the language of **Article III as a whole**, *see* App., *infra*, 19a-20a, is plain and therefore (a) deemed to carry its ordinary meaning, (b) presumed to express the framers' intent and (c) must be given effect unless (1) a contrary legislative intent is clearly expressed, (2) it would result in

an absurdity, or (3) it is not in harmony with the constitutional scheme. On the other hand, using such tools of construction, it is also clear that the language of the "exceptions clause", of Article III, while plain in itself,[10] cannot be presumed to express the framers' intent and cannot be given effect since (a) it is not in harmony with the constitutional scheme,[11] (b) a contrary legislative intent is clearly expressed,[12] and (c) it would result in an absurdity.[13]

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[10] The exceptions clause states plainly, "with such exceptions, and under such regulations as the "Congress shall make," U.S.Const., art . III, sec. 2, cl.2, however, *see* Raoul Berger, *Congress v. The Supreme Court* (Harvard University Press 1969) (hereinafter Berger), at 285-286, stating in relevant part as to the legislative history of the "exceptions clause": "[A contrary] inference is warranted if we look no further than the terms of [part of] the clause itself; . . . But apart from references to the impeachment power, there is scarcely a hint in the records . . . that the Founders intended to entrust Congress with a power to curb judicial 'excess'."

[11] *See* Berger at 4 which states: "[t]he more deeply I delved into the historical materials the more the wisdom of the tenet that a Constitutional grant is not be be read in isolation but in the context of the whole document was brought home to me."

[12] *See* Berger at 335 which states: "[f]ar from leaving 'the record vague and conflicting as to judicial review,' the Framers, I consider, made **reasonably plain** that such review was part of the Constitutional scheme." (Emphasis added.)

[13] *See* Berger at 4 n.16 which states: "James Wilson made the point in urging adoption of the Constitution before the Pennsylvania Ratification convention: 'Take the detached parts of any system whatsoever, in the manner these gentlemen have hitherto taken this Constitution, and you will make it absurd and inconsistent with itself.' . . . "

B. The Limits Of The Jurisdictional Issue Before This Court: Whether Congress Has The Power To Deny Judicial Review In A Case Which Otherwise Falls Squarely Within The Purview Of Article III?

Historically Congress has recognized[14] that aliens in general have the right to judicial review and that deportation orders in general are cognizable within the nine categories of cases and controversies enumerated in Article III.[15] *See, e.g.,* 8 U.S.C. § 1252, as amended by IIRIRA. Accordingly, it cannot be disputed herein that the issues of "alienage" or "deportability" constitute a bar *per se* to this Court's subject matter jurisdiction over such matters. Moreover, the DHS to date has not raised any jurisdictional defense issue of moment in the case herein regarding standing, ripeness, mootness, exhaustion or political questions concerns. *See* 1 Nat'l Lawyers Guild, *Immigration Law and Defense 3d*, § 10.3 (titled "Jurisdictional Defenses") (Clark Board Callaghan March 1997). Also, this case does not involve a question of expansion of jurisdiction. Accordingly, the only jurisdictional issue before this Court is whether Congress has the power to deny review in a case such as petitioner's which otherwise falls squarely within the purview of Article III?

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[14] "[A]s a general rule [Congress] may not grant jurisdictional power to the lower federal courts that is beyond the constitutional framework established by Article III. Thus, for example, only cases and controversies are within the federal judicial power, and jurisdiction may not be conferred over moot, advisory, abstract, or administrative questions." Wright, Miller & Cooper, *Federal Practice And Practice: Jurisdiction 2d*, § 3526 at 229 (West Pub. Co. 1984).

[15] Article III has no clauses excluding "aliens," "criminals" or "deportation orders" from its coverage; moreover, it does not exclude judgments regarding denials of discretionary relief.

C. The Principles And Rules Of Construction.

"The meaning of [Article III] has perplexed practitioners, judges and scholars . . ." Clinton, *A Mandatory View Of Federal Court Jurisdiction: A Guided Quest For The Original Understanding Of Article III*, 132 U.Pa.L.Rev. 741, 742 (1984) (hereinafter Clinton). The starting point in the debate over congressional restrictions on federal courts begins with the construction of the language of the Constitution. Chemerinsky, *Federal Jurisdiction*, § 3.2 (titled "Congressional Restriction Of The Jurisdiction Of The United States Supreme Court") at 152 (Little Brown & Co. 1989) (hereinafter "Chemerinsky"). The Courts may resort to the same rules of interpretation used in construing statutes. Rotunda & Nowak, *Treatise On Constitutional Law: Substance and Procedure* 2d, § 23.12 at 654 (West Pub. Co. 1992) (hereinafter Rotunda & Nowak). The Constitution Is Construed As A Whole. Rotunda and Nowak § 23:13 at 654. The plain language of the Constitution is presumed to express congressional intent unless a contrary legislative intent is clearly expressed.[16] *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 at 108 (1980). Statutes should be interpreted so as to preclude absurd results. *United States v. Wilson*, 503 U.S. 329, 334 (1992). Past practice and "[l]ong acquiescence of Congress and the Executive, however, does not

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[16] *See [INS] v. Phinpathya*, 464 U.S. 183 (1984) (it is presumed that the plain language of the statute expresses congressional intent); *Ardestani v. INS*, 112 S.Ct. 515 (1991) (such presumption is rebutted only in rare and exceptional circumstances when a contrary legislative intent is clearly expressed); and *Cardoza-Fonseca v. INS*, 480 U.S. 421, 432 n. 12 (1987) (it is appropriate to look to the legislative history to determine whether there is a "clearly expressed legislative intention" contrary to language which appears clear on its face).

make constitutional that which is unconstitutional." Rotunda and Nowak § 23:33. The efficiency and usefulness of a given law, standing alone, will not save if it is contrary to the Constitution. [*INS*] *v. Chadha*, 462 U.S. 919 at 944 (1983).[17]

D. The Plain Meaning Of Article III.

Article III, according to its own terms, admits only one reading: the federal judiciary (the Supreme Court and inferior courts, if any) is vested with all judicial power over the cases and controversies enumerated in Section 2 Clause 1 thereof and Congress' legislative power over such cases is administrative in nature. Such conclusion is arrived at by reading the text of Article III in sequential order as a whole[18] using traditional rules of construction in the following manner.

1. A Plain View Of The Language Of Article III As A Whole Focusing On The Power Of The Judiciary.

The language of Article III, Section 1 of the Constitution is plain:[19] all judicial power over the cases and controversies

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[17] *See also* Note, The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions, 110 Harv. L. Rev. 1850 (1997), stating, "the constitutional analysis must, of course, be separate from the policy considerations," *id.* at 1855 n. 52.

[18] *Compare* Redish, *Federal Jurisdiction: Tension In The Allocation Of Judicial Power* 2d Chap. 1, § V at 24-25 (titled "Congressional Restriction On The Jurisdiction Of Article III Courts: Organizational Note") (Michie Co. 1990).

[19] *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (White, J., dissenting) (Article III, § 1, of the Constitution is straightforward and uncomplicated on its face").

enumerated in § 2, Art. III, is vested in the federal judiciary (the Supreme Court and inferior courts, if any).[20] *See* U.S.Const., art. III, Sec. 1, App. *infra*, 19a:

> Section 1. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Clearly, all judicial power is given exclusively to the federal judiciary (the Supreme Court and inferior courts, if any) as a whole.[21] Accordingly, the Supreme Court and inferior courts, if any, exercise all judicial power as follows:

a. On the one hand, if Congress has not established any inferior courts[22] the Supreme Court necessarily has original jurisdiction over all cases and controversies enumerated in

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[20] *See* Clinton at 855 ("the original understanding of the framers who drafted and ratified article III was very simple[,] [i]t involved investing the federal courts with the whole of a described set of powers called the "judicial powers of the United States").

[21] Congress is given no judicial power whatsoever under Article III or anywhere else in the Constitution; instead, Art. I, § 8, Cl. 9 gives it the legislative "power ... [t]o constitute tribunals inferior to the Supreme Court," accord to Art. III, § 1 courts, *see* Redish, 15 *Moore's Federal Practice* Chap. 100 § B (titled "Congressional Power To Control Federal Court Jurisdiction") at 100-77 to 100-78 (Matthew Bender & Co. 1997), and Art. I, § 8, Cl. 18, the necessary and proper clause, gives Congress the legislative power to administratively control the federal judiciary in its exercise of all judicial power over the enumerated cases according to Art. III, Sec. 2, Cl. 2 (the exceptions and regulations clause).

[22] "Article III plainly imposes no obligation to create lower federal courts." Amar, *A Neo-Federalist View Of Article III: Separating The Two Tiers of Federal Jurisdiction*, 65 B.U.L.Rev. 205, 212 (1985).

the first clause of Section 2 of Article III,[23] *see* U.S.Const., Art. III, Sec. 2, Cl. 1.

b. On the other hand, if Congress has established inferior courts under Art. I, Sec. 8, Cl. 9, the Supreme Court has original jurisdiction "[i]n all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party," and appellate jurisdiction "[i]n all other cases before mentioned" (i.e., the remaining cases enumerated in Art. III, Sec. 2 Cl. 1). *See* U.S.Const., Art. III, Sec. 2, Cl. 2. Thereafter, the original jurisdiction of the federal judiciary depends on whether Congress uses its legislative power under Art. I, Sec. 8, Cl. 18 (the necessary and proper clause) to make exceptions under Art. III, Sec. 2, Cl. 2, Sent. 2 (the exceptions clause):

1. If Congress does not use its legislative power under the necessary and proper clause to make exceptions according to the terms of the exceptions clause, inferior courts have original jurisdiction over the remaining cases enumerated in Art. III, Sec. 2, Cl. 2,[24] or

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[23] Neither Article III nor any other constitutional provision outside of it bar the Supreme Court from exercising original jurisdiction over any of the cases and controversies enumerated in U.S.Const., Art. III, Sec. 2, Cl. 1.

[24] *Compare*, Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d, § 3526 at 230 (West Pub. Co. 1984) (on question whether Congress can refuse to vest in any federal court some portion of the judicial power granted by the Constitution, one of at least four positions possible asserts "the constitutional grant is self-executing, which would mean that if there is some part of the judicial power not vested by Congress, the federal courts can hear those cases on the basis of the Constitution alone"); *id.* at 233-234 stating: "[i]n 1949 the Court of Appeals for the District of Columbia Circuit asserted that Congress must confer the whole of the judicial power upon some federal court, and that if a case arises under the Constitution, laws, or

(Continued on following page)

2. If Congress does use its legislative power under the necessary and proper clause to make exceptions under the exceptions clause, inferior courts have original jurisdiction over the remaining cases enumerated in Art. III, Sec. 2, Cl. 1, except as to those cases excepted by Congress (i.e., using its legislative power to administratively control such cases)[25] from "all other cases before mentioned"[26] which cases necessarily become part of the Supreme Court's original jurisdiction.[27]

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treaties of the United States, jurisdiction to entertain it must be conferred on some district court by compulsion of the Constitution itself[,] [*Eisentrager v. Forrestal*, C.A. 1949, 174 F.2d 961, 966, 84 U.S.App.D.C. 396, reversed 1950, 70 S.Ct. 936, 339 U.S. 763, 94 L.Ed. 1255.] . . ."

[25] *See* Clinton at 855 stating "[i]ronically, the original understanding of the framers who drafted and ratified article III was very simple. It involved investing federal courts with the whole of a described set of powers called the 'judicial Powers of the United States,' and allowing Congress merely to work out the structures and procedure by which those powers would be exericised and to distribute the constitutionally defined powers among the various federal courts it structured. . . ."

[26] The first phrase of the second sentence of the second clause of Section 2 of Article III stating "[i]n all the other cases before mentioned" qualifies the entire sentence and is not only obviously connected grammaticaly to the last phrase of the sentence stating "with such exceptions, and under such regulations" (commonly referred to as the exceptions and regulations clause) but is connected to the entire sentence, including the exceptions and regulations clause, pursuant to the traditional rules of construction such as, for example, the requirement that its interpretation be grounded in the text of the Constitution consistent with the principles underlying the Constitution, and "[t]he general rule of interpretation, that exception of an item from a general clause proves the drafter's belief that but for the exception, the item would be within the general clause." *See* 4 Rotunda & Nowak, *Treatise On Constitutional Law* 2d, § 23.36 at 680 n.1 (West Pub. Co. 1992).

[27] The Constitution does not give the federal judiciary (the Supreme Court and the inferior courts, if any) the legislative power to divest itself of its judicial power which constitutionally remains vested

(Continued on following page)

2. A Plain View Of The Language Of Article III As A Whole Focusing On The Power Of The Legislature.[28]

Congress may exercise its legislative power to ordain, establish and constitute inferior courts, *see* U.S.Const., Art. I, Sec. 8, Cl. 9, according to the terms of Art. III, Sec. 1 and its legislative power under U.S.Const., Art. I, § 8, cl. 18 (the necessary and proper clause), *see* David E. Engdahl, Intrinsic Limits On Congress' Power Regarding The Judicial Branch, 1999 BYU L. Rev. 75, to administratively control the federal judiciary in its exercise of all judicial power over the enumerated cases and controversies and according to the terms of Art. III, Sec. 2, Cl. 2 (the exceptions and regulations clause) as follows:

a. On one hand, if Congress does not exercise its power to establish inferior courts, then the Supreme Court has original jurisdiction over all cases enumerated in Sec. 2, Cl. 1 of Art. III, or

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in it at all times. *See* 4 Rotunda & Nowak, *Treatise On Constitutional Law* 2d, § 23:10 at 653 (West Pub. Co. 1992), ("... Chief Justice Marshall also said: 'It is most true that this Court will not take jurisdiction it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution ... We have no more rights to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'")

[28] *See* David E. Engdahl, Intrinsic Limits On Congress' Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, stating in relevant part that "[t]he constitutional provision from which almost all of Congress' power regarding the judiciary derives is the Necessary and Proper Clause."

b. On the other hand, if Congress does exercise its power to establish inferior courts, then it has the legislative power to administratively control which of those cases enumerated in Art. III, Sec. 2, Cl. 1 (excluding those excepted in Article III, Sec. 2, Cl. 1, first sentence) the Supreme Court will have original jurisdiction over and which cases it will have appellate jurisdiction, *see* U.S.Const., Art. III, Sec. 2, Cl. 2.

1. Viewed another way, if Congress does exercise its legislative power to establish inferior courts, then the inferior courts have original jurisdiction over the cases enumerated in Art. III, Sec. 2, Cl. 1, **except** (a) "all cases affecting ambassadors, other public minister and consuls, and those in which a State shall be a party[,]" *see* U.S.Const., Art. III, Sec. 2, Cl. 1, first sentence, and (b) those cases of the remaining enumerated cases of Article III, Sec. 2, Cl. 1 excepted by Congress which necessarily become part of the original jurisdiction of the Supreme Court.[29]

E. The Right To Judicial Review Is In Harmony With The Totality Of The Constitution.

The right to judicial review pursuant to the plain meaning of Article III is in harmony with the totality of the Constitution, including but not limited to, undisputed foundational constitutional principles (i.e., supremacy of the law, independent judiciary, checks and balances, division of authority (the implied doctrine of separation of

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[29] *See* note above stating that the Constitution does not give the federal judiciary any legislative power whatsoever to divest itself of any part of its judicial power which pursuant to the Constitution must remain vested in the federal judiciary at all times.

powers)[30] and the like),[31] the other constitutional rights (*e.g.*, due process, habeas corpus)[32] and powers (*e.g.*, Congress' plenary power over aliens)[33] outside of the provisions of Article III, the tradition of judicial review of administrative action[34] and the traditional rules of construction.[35]

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[30] *See* Redish, 15 *Moore's Federal Practice*, Chap. 100, § B (titled "Congressional Power To Control Federal Court Jurisdiction," at 100-52 (Matthew Bender & Co. 1997).

[31] *See* Hervey, *Federal Textbook On Citizenship* Chap. XXI (titled "Basic Principles Of Our Government") (U.S. Dept. of Justice, Immigration & Naturalization Service 1973); *see also* Jaffe, *Judicial Control of Administrative Action*, Chap. 2 at 29 (titled "Delegation of Legislative Power") (Little, Brown & Co. 1965) ("Montesquieu's great point was that if the total power of government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive").

[32] The right to collateral review of deportation orders by means of the writ of habeas corpus is provided for in Article I, Sec. 9, Cl. 2 of and the right to due process of law is provided by the Fifth Amendment of the United States Constitution.

[33] *See* 1 Nat'l Immig. Project of Nat'l Lawyers Guild, *Immigration Law and Defense* 3d ed., § 10.3(a) at 10-10 to 10-13 (titled "Jurisdictional Defenses") (Clark Boardman Callaghan, March 1997) (commenting with respect to the political question doctrine).

[34] *See* Jaffe, *Judicial Control of Administrative Action*, Chap. 9 (titled "The Right To Judicial Review") (Brown, Little & Co. 1965) (stating *inter alia*) "[t]he availability of judicial review is the necessary condition . . . of a system of administrative power which purports to be legitimate, or legally valid[,]" *id.* at 320, and " . . . the availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity [,]" *id.* at 321.

[35] *See* section titled "The Principles And Rules Of Construction" herein-above.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSELIA RIOS-DE AGUAYO, Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 03-70036 Agency No. A76-659-611 MEMORANDUM* (Filed Dec. 15, 2003)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted December 8, 2003**

Before: FISHER, GOULD and CALLAHAN, Circuit Judges

Respondent's motion to file motion for summary disposition instanter is granted. The motion for summary disposition has been filed.

This is a petition for review of an order denying petitioner's application for cancellation of removal. We sua sponte dismiss in part this petition for review because the court lacks jurisdiction to review a discretionary decision regarding exceptional and extremely unusual hardship. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Romero-Torres v. Ashcroft*,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

327 F.3d 887, 892 (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

Respondent's motion for summary denial is granted in part because the remaining question raised by this petition for review is so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard for summary disposition); *Falcon Carriche v. Ashcroft*, No. 02-71143, 2003 WL 22770121 (9th Cir. Nov. 24, 2003) (holding that the Board of Immigration Appeals' streamlining procedures do not violate Fifth Amendment right to due process).

PETITION FOR REVIEW DISMISSED IN PART AND DENIED IN PART.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76-659-611 – San Diego Date: DEC-6 2002

In re: RIOS-DE AGUAYO, ROSELIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDET: Montes, Raul M., Esquire

ON BEHALF OF SERVICE: Manoogian, William, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted

by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File No.: A 76 659 611 December 10, 1998

In the Matter of ROSELIA RIOS-DE AGUAYO, Respondent	)	IN REMOVAL PROCEEDINGS

CHARGES: Section 212(a)(6)(A)(i) of the I&N Act, as amended – Alien present in the United States without inspection and admission or parole.

APPLICATION: Termination of proceedings. Cancellation of proceedings. Voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Raul Montes, Esquire	Janet Muller, Esquire

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The respondent herein is 31 years of age and married, a native and citizen of Mexico, who arrived in this country in 1987, crossing the international border from Mexico without a benefit of the inspection or parole process.

On March 17, 1998, the Immigration and Naturalization Service issue a Notice to Appear, which was filed with my office on March 20, 1998, thus instituting these proceedings. Exhibit 1.

In this document, the Service contends the respondent is subject to removal from the United States on the charge set forth above.

The respondent and counsel appeared before me for master calendar pre-trial conference on May 19, 1998 and signed and filed a record of that appearance. Exhibit 4. In it, the respondent admitted all factual allegations in the Notice to Appear, but contested the charge of removal. The theory of contest is that the Service should have placed the respondent in deportation rather than removal proceedings.

Counsel for the respondent has filed a formal motion to terminate proceedings. Exhibit 10. This motion is supported by a group of documents. Exhibit 11. These materials indicate that the respondent, through counsel, on October 9, 1995, brought to the attention of the Service her illegal presence in the United States, and asked that she be placed in deportation proceedings, this in order to apply for suspension of her deportation. Exhibit 11, Item A.

In response, the Service issued a form letter asking for additional information. Id., Item B. On October 31, 1996, the respondent submitted the form as requested by the Service. Id., Item C. It was not until March 17, 1998, however, that the Service notified the respondent to appear for an interview, preparatory to instituting proceedings. Id., Item D.

The respondent believes that this sequence of events necessitates my termination of proceedings on grounds of due process and equitable estop. The respondent asserts that the failure of the Service to act quickly in placing her in proceedings resulted in her being placed

in removal rather than deportation proceedings. This is true because on September 30, 1996, the capital President signed into law amendments to the Immigration and Nationality Act known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").

The IIRIRA amendments abolished deportation proceedings for those aliens not under deportation proceedings as of April 1, 1997 and substituted in their place the removal hearing system. At that same time, the IIRIRA amendments repealed the suspension of deportation law, and substituted in it's place the cancellation of proceedings statute.

Under the suspension law, the respondent would have had to have shown extreme hardship, if she were expelled from this country, either for herself or to her immigrant spouse or American children. However, in removal proceedings, if the respondent asks for cancellation of proceedings, she cannot show hardship as to herself. Instead, the cancellation statute requires that she show "exceptional and extremely unusual hardship" to her immigrant spouse or American children. Obviously, this is a more restrictive remedy than suspension of deportation.

Counsel for the respondent has been unable to cite to me any case which would permit me, as an administrative judge, to apply the doctrine of due process to terminate immigration court proceedings. Also, counsel for the respondent concedes that there is no precedent authority to terminate these proceedings on equitable estop grounds. These issues are left to a judicial court of record for resolution.

For these reasons, the motion to terminate proceedings must be denied.

The respondent has admitted all applicable factual allegations in the charging document. These allegations establish the following: that she is an alien; a native and citizen of Mexico; that she entered the United States at or near San Ysidro, California in the year 1987; that she was not then admitted or paroled after inspection by an immigration officer.

The factual allegations establish the charge of removal, and I note the only reason the respondent contested the charge was to support her motion to terminate proceedings. The charge is established by clear and convincing evidence.

The respondent has filed an application for cancellation of removal. Exhibit 16. The record developed, and the exhibits in evidence (Exhibits 15, 17, 20) convince me the respondent meets the cancellation of removal requirements of 10 years continuous physical presence in this country and good moral character for a like period.

Furthermore, I see nothing in the record which would require me to reject her application for cancellation of removal in the exercise of discretion. The issue for resolution is whether she shows the requisite hardship, either as to her immigrant husband or two American-born children.

The respondent testified first on the issue of hardship. She pointed out that her older child, six-year-old, Herendira, is a bright youngster who is enrolled in first grade of elementary school. Prior to that, she completed

kindergarten and also a pre-school program. The respondent described Herendira as a very good student who understands English better than Spanish. The respondent watches English language television. She is taught in English at school, and wishes to become a firefighter when her education is completed.

Also, the respondent advised that the godmother of Herendira, Rosalinda Regalado, resides in the San Diego area and has a close relationship with the child. The respondent pointed out that a godparent has the obligation of watching out for and guiding the child.

The respondent's husband works for himself in landscaping. At home, the respondent and her husband share the cooking chores and the respondent does the laundry. Both do housecleaning.

If Herendira went to Mexico, the respondent fears that she would not do well there. She pointed out that, some time ago, Herendira accompanied her father to Mexico to see her father's parents. She liked the visit at first, but soon became uncomfortable. The respondent failed to explain the nature of the discomfort.

The respondent also confessed that she and her husband have not talked about the future with regard to the possibility that the respondent would be expelled from the United States, but the respondent opined that it would be very difficult for herself, and her children, to "reintegrate" into Mexican society. She pointed out that the children are getting used to the English language in this country, American food, and she doubts that the children would be very comfortable in Mexico.

For the older child, Herendira, the respondent fears that it would be extremely hard for her to adapt to a life in Mexico because she is a bright child, and is well aware of her surroundings at present. The respondent did admit the Herendira speaks "good Spanish".

The respondent does not know at this time where she would live in Mexico, if forced to return there. She hasn't given it much thought, but believes that Herendira and the younger child, would both accompany her to Mexico. If that happens, she fears hardship for her husband, as he is close to the children, especially Herendira.

She believes that it would be very hard [sic] Herendira to go to school in Mexico, and she would have to give up the dream of becoming a firefighter in the United States.

The respondent opined that if she has to go to Mexico her husband would continue to support her, at least initially, but she fears that in due course, he might find "another woman".

Next on the witness stand was Cresencio Aguayo-Gonzalez, the respondent's husband. Mr. Aguayo became an immigrant in 1988 via the Amnesty Law. In 1991, he pled guilty to being an accomplice to the crime of sale of marijuana. After serving nine months in custody, he was placed in deportation proceedings. Because of the intervening changes in the law, he was found ineligible for a waiver of deportability and his case is presently in appellate review proceedings before the 9th United States Circuit Court of Appeals.

Mr. Aguayo has not discussed the future with the respondent concerning how the family would arrange things if the respondent is expelled to Mexico. Nor has Mr. Aguayo thought about the future should he ultimately lose his case on appeal.

He opined, however, that it would be difficult for the children in Mexico "as we have all been together in the United States." Mr. Aguayo testified that it would be difficult to separate from his family, and said separation would mean the end of his plan to ultimately buy the family home.

Mr. Aguayo and the respondent have lived together since 1988, but married only a few years ago. Mr. Aguayo testified that he could not afford the paperwork fees in order to marry sooner. He described the respondent as a good mother and he loves her very much and would be affected a lot if she is expelled to Mexico.

At present, Mr. Aguayo could not say where his wife would settle in Mexico, but did say that if she goes there with the children, he could not afford to maintain two households. He testified that if the respondent returns to Mexico, the children would be greatly affected as neither could be without her. If he is separated from the family, it will affect him and his older daughter "a lot".

A final possible witness was Juan Orozco, the former employer of the husband of the respondent. By way of offer of proof, the respondent stated that Mr. Orozco would testify that he has known the respondent and her husband for over 10 years, and that he has worked with respondent's husband for the past 12 years and would testify that the family is very close knit and loving. This testimony was accepted by Service counsel.

In closing argument, counsel for the respondent asserted that there has been a valid showing of the requisite degree of hardship, both as to the older child of the respondent and as to the respondent's husband. He emphasized that separation of family might be the "single most important factor" on the issue of hardship.

Counsel also pointed out that the older child, Herendira, is a bright youngster with meritorious awards for good conduct. She has a sense of who she is and her surroundings, and she wants to become a firefighter when her education is completed. Expulsion of her mother to Mexico might be the end of her plans.

Addressing first the issue of extreme hardship as to Herendira, case law precedents dealing with the issue of "extreme hardship" under the suspension law indicate that the younger the child, the less likely it is that the child will suffer extreme hardship if forced to accompany the parent to Mexico. This rule is applicable in this case.

Herendira is not a mature youngster in the sense that she has completed many years of education in the United States. She is in good health, and has just started her elementary school education. Although she speaks fluent English, her Spanish is also good.

Accordingly, I am not convinced that Herendira would suffer the requisite degree of hardship if required to accompany her mother to Mexico. The same is true for the respondent's younger daughter, now one month old. This infant is in good health and there is no indication that she would suffer the requisite hardship if her mother were expelled from the United States.

As for the respondent's husband, there could be no doubt that any separation of him from his wife and children will be a hardship, both for himself [sic] for the children. However, the record is not clear as to what the family intends to do about the future. It is not entirely clear as to whether the respondent's husband would accompany the respondent and children to Mexico or whether he would remain in the United States.

There are indications that the husband would attempt to remain here, this in view of the fact that he has just started his own landscaping business. He asserts that it would be very difficult, if not impossible, to maintain two households. However, this conflicts with the testimony of the respondent herself, who gave the opinion that at least initially her husband would continue to support her and the children if she left for Mexico.

On this particular point, I point out that the respondent, her husband and the children are all in good health. The respondent herself has work experience in this country as a domestic.

In addition, I note that both the respondent and her husband have many relatives, this is in the persons of their parents and siblings. There is no showing as to why these relatives could not pool their resources to assist the respondent financially if she is required to make a home for the children in Mexico.

Recognizing that there is undoubtedly hardship in this case, the issue presented is whether the requisite degree of hardship has been shown. As stated earlier, the suspension of deportation remedy has been replaced

with the cancellation of proceedings remedy, but cancellation limits the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted.

"The managers have deliberately changed the required showing of hardship from 'hardship' to 'exceptional and extremely unusual hardship' to emphasize that the alien must provide evidence or harm to her spouse, parent or child substantially beyond that which ordinarily would be expected to result from the alien's deportation. (Similarly, a showing that an alien's United States citizen child would fair less well in the alien's country of nationality than in the United States does not establish "exceptional" or begin 'extremely unusual' hardship and thus would not support a grant of relief under this provision). Conference Report on H.R. 2202, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congressional Record: September 24, 1996 (House), Page H10896.

The concept of "exceptional and extremely unusual hardship" has long been present in other sections of the Immigration and Nationality Act. It has been held that such language applies to those cases of a limited category in which deportation of the alien "would be unconscionable". *Asikes v. Borwnelle* [sic], 230 F.2d 34 (CADC 1956); *Matter of C-*, 7 I&N Dec. 608 (BIA 1957).

In other words, hardship or even unusual hardship to the alien or the qualifying spouse, parent or child is not sufficient to justify the granting of the remedy. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) n. 3.

In this case, I point out that the question is not one of expelling the respondent to a country on the other

side of the globe but to a country adjacent to the United States. True, there will be a hardship in the separation of this family, or any other family, but I must conclude that this hardship does not rise to the requisite degree as mandated by the cancellation of proceedings statute.

Accordingly, the respondent is denied cancellation of proceedings on the ground that she does not show the requisite degree of hardship.

The respondent was hopeful that she might qualify for Section 245(i), adjustment of status, and to that end she submitted some supporting document. Exhibit 15.

The record contains evidence that her husband has filed a visa petition for her immigrant visa. Exhibit 6. However, the Service has not acted upon the visa petition, this because the status of the respondent's husband as an immigrant is problematical, this in view of the fact that he has been ordered deported and his case is on appellate review.

Accordingly, counsel for the respondent later advised that she would not submit a formal application for adjustment of status, and that issue is deemed moot.

Finally, the only other remedy that can allow the respondent to avoid an order of removal is voluntary departure. I find her to be statutorily eligible for this remedy and worthy of it in the exercise of discretion. The appropriate order shall be entered.

ORDER

IT IS HEREBY ORDERED that the respondent is denied termination of proceedings.

IT IS FURTHER ORDERED that the respondent is denied cancellation of proceedings, but granted, in lieu of an order of deportation, the privilege of departing this country voluntarily and at her own expense, such departure to take place at any or time on or before February 8, 1999. The respondent must depart under such conditions as the District Director of the Immigration and Naturalization Service may choose to impose.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without any further notice or proceedings and this order shall become effective at once: The respondent shall be removed from the United States to Mexico on the charge contained in her Notice to Appear.

IT IS FURTHER ORDERED that respondent shall post a voluntary departure bond in the amount of $500 within five business days of the date of this decision, such bond to be posted with the District Director of the Service, this to ensure that the respondent departs within the time specified.

IT IS FURTHER ORDERED that if bond is not posted within five business days, the voluntary departure order shall vacate automatically and the alternative order of removal will take effect the following day.

IT IS FURTHER ORDERED that if the respondent fails to depart voluntarily when and as required, the respondent shall be subject to a civil penalty of not less than $1,000 nor more than $5,000, and be ineligible for

a period of 10 years for any further relief under this section and Sections 240(A), 245, 248 and 249.

/s/ Robert Barrett
Robert Barrett
Immigration Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSELIA RIOS-DE AGUAYO, Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 03-70036 Agency No. A76-659-611 ORDER (Filed Jun. 7, 2004)

Before: FISHER, GOULD and CALLAHAN, Circuit Judges

The panel has voted to deny the petition for rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**. No further filings shall be accepted in this closed appeal.

ARTICLE III – THE JUDICIARY

Sec.

1. Judicial Power, Tenure and Compensation.

2. Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction; Criminal Trial by Jury.

Cl.

1. Jurisdiction of Courts.

2. Supreme Court, Original and Appellate Jurisdiction.

3. Criminal Trial by Jury.

3. Treason; Punishment of Treason.

Cl.

1. Treason.

2. Punishment of Treason.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction;

– to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may

[1] This clause has been affected by the Eleventh Amendment.

not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review –

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, nor court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

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§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United Stats continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1127(a)(3) of this title; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.